

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION**

**E.I. DUPONT DE NEMOURS AND CO., INC.**

**Employer**

**and**

**Case 3-UC-514**

**USW 6992<sup>1</sup>**

**Petitioner**

**DECISION AND ORDER CLARIFYING BARGAINING UNIT IN PART**

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon an administrative investigation based upon the filing of the petition in this proceeding, I find:

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Petitioner and E.I. DuPont de Nemours and Co., Inc., hereinafter referred to as the Employer, stipulated that the Employer is a Delaware corporation engaged in the manufacture of Corian and Tedlar products at its facility located at Sheridan Drive and River Road in

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<sup>1</sup>The name of the Petitioner appears as amended at the hearing.

Tonawanda, New York. Annually, the Employer sells and ships from its Tonawanda, New York facility, products valued in excess of \$50,000, directly to points outside New York State. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

The Petitioner and the Employer stipulated, and I find, that the United Steel Workers, Local 6992 ("Petitioner") is a labor organization within the meaning of Section 2(5) of the Act.

The Petitioner is the collective-bargaining representative of the following employees at the Employer's Tonawanda, New York facility, herein called the "Yerkes" facility:

- (a) All production and maintenance employees at the Company's Plant located near Buffalo, New York (Township of Tonawanda) including plant clericals and analysts: excluding office clericals, professional employees, guards and supervisors as defined in the Act as initially established in Case No. 3-RC-1212 by National Labor Relations Board certification dated June 19, 1953.
- (b) All office clerical employees not exempt under the Fair Labor Standards Act, excluding confidential stenographers and confidential clerks.

The parties' most recent collective-bargaining agreement expired prior to January 12, 2001.<sup>2</sup> The parties stipulated that on or about January 12, 2001, in the course of negotiations for a successor agreement, the Employer offered and subsequently implemented its "Final Offer" containing a recognition clause by which the Employer recognizes the Petitioner as the exclusive collective-bargaining representative of the unit employees. The parties have operated under the terms of the Final Offer from its implementation in 2001 through to the present.

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<sup>2</sup> The record is silent as to the specific term of the expired collective-bargaining agreement.

The Petitioner filed an original and amended unit clarification petition on May 25, 2005 and October 19, 2005, respectively, proposing to clarify the collective-bargaining unit to include the following newly created job classifications: production assistant Corian sheet; production assistant Tedlar; Tedlar SAP data-supervisor; material and resource specialist; and freight verification-shipping coordinator. There are two employees in the production assistant Corian sheet and production assistant Tedlar classifications, and one employee in each of the other classifications.

The Petitioner asserts that the disputed job classifications should be included in the bargaining unit because they share a community of interest with the existing bargaining unit employees. The Petitioner further contends that, although the material and resource specialist classification is new, the duties of the classification were historically performed by employees in the bargaining unit and, as such, should remain in the bargaining unit.

The Employer opposes the proposed unit clarification and maintains that, although the classifications are newly created, the positions, with the exception of the material and resource specialist, are excluded from the bargaining unit because they are exempt employees under the Fair Labor Standards Act. The Employer further argues, in its post-hearing brief, that all five classifications lack a community of interest with the employees in the bargaining unit.

I find the unit clarification petition is timely. A petition clarifying an existing bargaining unit is appropriate to resolve the placement of newly created job classifications. Union Electric Co., 217 NLRB 666 (1975); Bethlehem Steel Corporation, 329 NLRB 245 (1999).

Based on the record evidence, I conclude that the production assistant Corian sheet, material resource specialist and freight verification-shipping coordinator share an overwhelming community of interest with the employees in the bargaining unit, and I shall clarify the

bargaining unit to include these positions.<sup>3</sup> However, I find that the production assistant Tedlar and the Tedlar SAP data-supervisor do not share an overwhelming community of interest with the bargaining unit employees and therefore the Petitioner's request to clarify the unit to include these positions is denied.

**Facts:**

The Employer manufactures Corian and Tedlar products at its "Yerkes" plant located in the township of Tonawanda outside of Buffalo, New York. Corian is an acrylic-based solid surfacing material used primarily for kitchen and bathroom countertops. Tedlar is a poly-vinyl fluoride material used in various products for protective covering.

The Yerkes plant employs approximately 650 employees in the Tedlar and Corian departments. Approximately 150 employees work in the Tedlar department and the remaining 500 employees work in the Corian department. The Corian and Tedlar departments are located in separate buildings at the Yerkes plant. The exact proximity of the buildings to each other is unclear from the record; however, they are located at the same plant facility. The plant operates three work shifts.<sup>4</sup>

There are approximately 425 to 430 employees in the current bargaining unit. Bargaining unit employees include production and maintenance employees, operators, non-exempt office clericals, plant clerical personnel and approximately 40 analysts. The lab analysts review the product for quality control. Plant clerical employees include shipping clerks, maintenance clerks and sourcing and store clerks. The office clericals include the steno-organization position and several mail-room employees.

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<sup>3</sup> I shall also include the material resource specialist in the bargaining unit because the duties performed by the material resource specialist were historically, substantially performed by bargaining unit employees.

<sup>4</sup> The record is unclear as to the specific hours of the work shifts.

Plant clerical employees are located in the Tedlar and in the Corian administrative offices. It is unclear from the record the number of plant clericals in the overall unit or the number of plant clericals located in the respective Corian and Tedlar buildings. The production and maintenance employees work on the Corian and Tedlar production floors or in cubicles close to the production floors.

Generally, bargaining unit employees are supervised by first-line supervisors. The first-line supervisors report to the area superintendents. The area superintendents do not directly supervise bargaining unit employees.

The Employer implemented Systems Applications Products' computer software (herein referred to as "SAP") for the Tedlar and Corian departments in April and August of 2004, respectively, to maintain and integrate many of the Employer's business operations. The Employer implemented the SAP software company-wide (all of the United States and North America) in August 2004. The software is a "resource planning software tool" that integrates the Employer's financing, accounting, product and material purchasing, sales, shipping, manufacturing and various other business operations. The system allows for "real time" reporting of information between different operations. For example, when material is actually produced or shipped to a customer, the item is automatically billed. The Employer's objective for using SAP is to reduce inventory and "cycle time." This allows the Employer to monitor and track production schedules, production runs and inventory, while translating that information into the company financial records for paying vendors and suppliers and for up-to-date accounting.

Prior to SAP, the Employer used software systems such as CRIMP (Corian Reporting Information Management Program), TRIMP (Tedlar Reporting Information Management

Program) and various other software systems, many of which are now integrated into SAP. These older systems updated information on a monthly basis or in a “batch” of information rather than in “real time.” Bargaining unit employees in the Corian and Tedlar departments continue to use these older systems to perform their duties in addition to, or in conjunction with, the new SAP system. For example, the production operators update information into the CRIMP system which is interfaced with SAP. Many bargaining unit employees use SAP to perform their job duties. These employees include the lab analyst, store operators and purchasing agents, all of whom access and perform transactions in SAP.

With the implementation of the SAP software in 2004, the Employer created the production assistant Corian sheet, production assistant Tedlar, freight verification-shipping coordinator and Tedlar SAP data-supervisor positions. The material and resource specialist position was created in January 2005, but not as a result of the SAP implementation.

Approximately 90 bargaining unit employees are salaried, the remainder are hourly employees. Some of the plant clerical employees are hourly and some are salaried. Both bargaining unit and non-bargaining unit employees are paid bi-weekly and some employees of both groups’ wages are determined by the same salary schedule. Pursuant to the collective-bargaining agreement, salaried and hourly bargaining unit employees are eligible for overtime pay at a wage rate of time and a half. Bargaining unit and non-bargaining unit employees receive similar benefits such as health insurance, life insurance, disability insurance, dental insurance, pension coverage and a 401K plan.

The record evidence does not state the specific wage rate for each job classification at issue herein, however the wage ranges of the new job classifications are comparable to those of the bargaining unit employees. The production assistant Corian sheet annual salary ranges from

\$48,000 to \$51,000. The production assistant Tedlar annual salary ranges from \$55,000 to \$60,000 per year. The highest paid bargaining unit employee earns \$26 per hour, or \$54,080 per year based on a 40-hour work week. There are also salaried bargaining unit employees who earn between \$37,332 and \$52,500 per year.<sup>5</sup> The Employer classified the production assistant Corian sheet, production assistant Tedlar, freight verification-shipping coordinator and Tedlar SAP data-supervisor as exempt employees under the Fair Labor Standards Act.<sup>6</sup> The Employer classified the material and resource specialist as non-exempt under the Fair Labor Standard Act.

All employees are eligible for a local performance-based bonus. The bonus is based on the local facility's performance and both bargaining unit and non-bargaining unit employees are eligible to receive an equal percentage based on an employee's pension-based earnings. Salaried exempt employees receive an additional bonus based on performance, which is not fixed to compensation. Salaried employees receive this bonus based on individual performance and the performance of the overall business. Bargaining unit employees do not receive this bonus.

Bargaining unit employees receive two 15-minute breaks, one in the morning and one in the afternoon. They also have a 30-minute lunch period. The Corian and Tedlar buildings each have a cafeteria available for use by both bargaining unit and non-bargaining unit employees. Some bargaining unit employees wear protective clothing supplied by the Employer, such as flame resistant overalls, hard hats, safety glasses or goggles. Unit employees in the Tedlar finishing, clerical, treating and casting departments wear casual clothing.

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<sup>5</sup> According to the Employer, the minimum salary for the new positions is \$53,500. However, Christian Dohring, production assistant Corian sheet, testified that her annual salary ranges from \$48,000 to \$51,000. The Employer asserts that all of the new classifications are salaried; however, Debbie Kowalski, production assistant Tedlar, testified that she is an hourly, not salaried, employee. The record also reflects, and the parties do not dispute, that one of the new positions at issue herein, the material resource specialist, is salaried, but eligible for overtime pay.

<sup>6</sup> The Fair Labor Standards Act exempts from its mandatory overtime pay requirements salaried employees who are compensated at a rate not less than \$455 per week or \$23,000 per year.

## **Production Assistant Corian Sheet**

The production assistant Corian sheet classification was created in May 2004 and employees Brian German and Christine Dohring are the first employees to occupy the position. German previously was in a bargaining unit position in the Tedlar department.<sup>7</sup> Dohring previously was in non-bargaining unit positions.<sup>8</sup>

The production assistants are responsible for Corian inventory at the facility. They arrange the transfer of Corian inventory to and from the facility and the accounting of the Corian inventory in the SAP system. They monitor the Corian inventory through the production process from its purchase as raw material to delivery to the customer. To perform this task, the production assistants determine the material needed in inventory to produce the product, identify inventory discrepancies, and perform physical inventories on the production floor with bargaining unit employees.

The production assistants use SAP to track Corian inventory. Prior to SAP, CRIMP was used to monitor the manufacturing of Corian inventory on the production floor. Bargaining unit employees on the production floor continue to input inventory information in the CRIMP system, which is now interfaced with SAP.

The production assistants spend approximately 40 percent of their time with bargaining unit employees on the production floor, including production floor operators and employees in the “reclaim group.”<sup>9</sup> The production assistants determine where the material is delivered based on the information in SAP. The production assistants communicate daily with the reclaim group

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<sup>7</sup> The record indicates that German may have been on detail as a temporary supervisor at the time he became a production assistant Corian sheet.

<sup>8</sup> Dohring was hired in 2000 as an office clerical “steno” within the bargaining unit. In May of 2004, six months prior to receiving the production assistant position, she transferred to customer service, a non-bargaining position.

<sup>9</sup> The reclaim group consists of five bargaining unit employees who are responsible for receiving material from the manufacturing department.



employees and the production floor operators to complete transactions in the SAP system and to disperse material to various locations. On occasion, they visit the worksites of outside contractors.

The production assistants investigate inventory discrepancies in SAP. They go to the production floor and meet with production floor operators and the reclaim group employees to investigate discrepancies in the system and to locate the ordered material for shipping. Each month, the production assistants conduct a physical inventory on the production floor with the reclaim group employees and they update the information in SAP.

Both production assistants German and Dohring report directly to Russ Dibalski, process supervisor.<sup>10</sup> Dibalski also supervises the five bargaining unit employees in the reclaim group.

The production assistant Corian sheet work from approximately 7:30 a.m. to 4:00 p.m., Monday through Friday. Their annual salary ranges from \$48,000 to \$51,000. They work in cubicles located off the production floor.<sup>11</sup> The production assistants are on call during off-work hours. They do not receive overtime pay. Approximately three or four times a week they are needed to log into SAP from home using Company laptops to address inventory problems.<sup>12</sup>

The parties stipulated that a bargaining unit employee, Kathleen Miller, relief production assistant, fills in for production assistants Brian German and Christine Dohring when needed. This occurs approximately 10 percent of the time, including when the production assistants are scheduled for leave. Miller has the same level of access to SAP as the production assistants. Like the production assistants, Miller uses a laptop computer to perform the production assistant duties. Other bargaining unit employees also use laptop computers at work.

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<sup>10</sup> The Employer, in its brief, states that the production assistant Corian sheet receives “functional direction” from Kevin Christy, surface global manufacturing process integration leader. Christy does not supervise the production assistants or any other employees.

<sup>11</sup> The record is silent as to a more specific location of the production assistants’ cubicles.

<sup>12</sup> The record does not disclose whether bargaining unit employees use laptop computers at home to access SAP.

### **Production Assistant Tedlar**

The production assistant Tedlar classification was created in or about May or June 2004 and is currently occupied by employees Debbie Kowalski and Joseph Labuda. Kowalski works in the Tedlar treating and finishing area. Labuda performs the same duties as Kowalski in the Tedlar polymer mix and casting area. Prior to being in the Tedlar production assistant position, Kowalski and Labuda were in non-bargaining unit positions.<sup>13</sup>

The production assistants Tedlar are responsible for Tedlar inventory. They maintain inventory on a daily basis by troubleshooting inventory discrepancies in SAP and on the production floor. They receive a spreadsheet, via e-mail, of process orders to investigate. Patricia Morrison, the Tedlar accountant/planner, a bargaining unit employee, sends them the spreadsheet and communicates with the production assistants several times a day. The production assistants use the spreadsheets to investigate and reconcile the inventory discrepancies. The Tedlar operators, who are bargaining unit employees, enter inventory data from the process orders into the SAP system. The production assistants receive an error message if there is a discrepancy in the system. Their job is to reconcile the error by working with bargaining unit employees, including production floor operators, reclaim group employees and first-line supervisors, to locate the inventory on the production floor. They review the information inputted into SAP and inquire with the employees who input the information to identify the source the inventory discrepancy. Kowalski testified that she interacts with the first-line supervisors of bargaining unit employees in the Tedlar treating and finishing areas when she troubleshoots errors in SAP, and assists them if they are having problems with the system.

The production assistants conduct monthly and annual physical inventories with production floor operators, first-line supervisors and unit employees in the accounting

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<sup>13</sup> Kowalski was a customer service coordinator and Labuda was an expert coordinator in sales.

department. Inventory requires that the production assistants print out account sheets from SAP and verify that the inventory is present on the production floor. The production assistants then input the inventory data into the SAP system. While performing the inventory, the production assistants receive inventory data from the “charter,” who is a bargaining unit employee.<sup>14</sup> The charter also provides inventory data to the production floor operators.

Morrison, the Tedlar accountant/planner, testified that she is involved in the monthly inventory and coordinates the annual physical inventory with the production assistants. After these inventories are completed, the records are entered into SAP and Morrison reviews the process orders that go through SAP for any financial irregularities.

Kowalski’s immediate supervisor is Robert Williamson, superintendent for heating, finishing and distribution. Labuda reports to Greg Hoffman, polymer mix casting superintendent. Williamson and Hoffman do not supervise bargaining unit employees.

The production assistants Tedlar work from approximately 8:00 a.m. to 4:30 p.m., Monday through Friday. Labuda’s work area is in the casting office and Kowalski’s is in the treating, finishing and distribution area. Both work in cubicles near the first-line supervisors’ office or cubicle. The production assistants attend meetings with management that unit employees do not attend. Morrison attends meetings with Kowalski and Labuda but the record is silent as to the nature of these meetings. Kowalski received SAP training in Wilmington, Delaware.<sup>15</sup>

The Tedlar production assistants are not on call during off-work hours. When one of the production assistants Tedlar is on vacation, the other substitutes. In the event both were to take leave, Christopher Davis, SAP business process integrator, testified that he or one of the first

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<sup>14</sup> The record variously refers to this job classification as “charter” or “production planner.”

<sup>15</sup> The record is silent as to whether Labuda received the same training. Morrison also received SAP training in Wilmington, Delaware.

line supervisors would fill in for them.<sup>16</sup> No one directly reports to Davis and bargaining unit employees report to the first-line supervisors. The production assistants do not fill in for any unit employees, first-line supervisors, or for Davis. Although the production assistants Tedlar have laptop computers, they do not take them home to log in to SAP during off-work hours.

The production assistants Tedlar are hourly employees. Although the Employer asserts that the production assistant Tedlar is a salaried position and that all hourly employees are bargaining unit employees, Kowalski, testified that she is not a salaried employee. The production assistants Tedlar job description is silent regarding pay for the position. Davis testified that the production assistant Tedlar's annual salary ranges between \$55,000 to \$60,000 per year. The production assistants Tedlar receive a lunch and other breaks, but the duration and number of the breaks is unclear from the record.

#### **Freight Verification-Shipping Coordinator**

The freight verification-shipping coordinator position is currently held by Marty Magiera, who has held the position since it was created in June 2005. Magiera was in non-bargaining unit positions prior to the freight verification-shipping coordinator position. These positions were located outside the Yerkes plant and included SAP data maintenance.

The freight verification-shipping coordinator coordinates incoming and outgoing shipments for the Corian and Tedlar departments. Magiera's duties include comparing freight with shipment orders to ensure shipment terms are satisfied, and monitoring shipment orders in the freight payment system which interfaces with SAP. He collects bills of lading and incoming and outgoing documents, and assists the shipping department with the shipment of hazardous

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<sup>16</sup> The record is silent as to whether Davis or one of the first-line supervisors ever filled in for the production assistants Tedlar. Davis testified that the production assistants Tedlar were instructed not to take vacation leave at the same time.

material regulated by the Department of Transportation.<sup>17</sup> Magiera insures that approved and contracted carriers are used for the transport of material. He authorizes payment of incoming inventory and communicates with the Wilmington office regarding the use of the payment system.

Magiera has contact with bargaining unit shipping clerks in the shipping/receiving department. He and the shipping clerks handle the paperwork for shipping and receiving hazardous materials. Magiera collects the bills of lading, and inbound and outbound shipping documents from the shipping clerks. Magiera reviews the paperwork to ensure the safe transport of hazardous materials. In the purchasing department, bargaining unit employees clarify any discrepancies with the purchase orders before Magiera authorizes payment. Before payment, he verifies the purchase order terms and freight records with the purchasing department unit employees. Magiera has contact with Patricia Morrison, Tedlar accountant/planner, when there are problems with a freight transaction in SAP. When a freight transaction is rejected in the SAP system, Morrison contacts Magiera for his assistance with the transaction information.

Magiera's immediate supervisor is Joe Younger.<sup>18</sup> Younger also supervises bargaining unit shipping and receiving employees. The record does not indicate whether Magiera fills in for bargaining unit employees or whether unit employees fill in for him.

The freight verification-shipping coordinator is a salaried position and is ineligible for overtime. Magiera's hours of work are generally from 7:30 a.m. to 4:00 or 4:15 p.m. He has an office in the Corian administrative office. Bargaining unit plant clerical employees are also

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<sup>17</sup> Magiera is certified by the Department of Transportation (DOT) to transport hazardous material and he has received hazardous material training. He uses this training to complete DOT-required paperwork for the transportation of hazardous material. There are bargaining unit employees who are also DOT-certified and trained in hazardous material transportation.

<sup>18</sup> The record does not indicate Younger's job title.

located in the Corian administrative office. Magiera estimates that the production floor is several hundred yards from the Corian administrative offices.

### **Material and Resource Specialist**

The material and resource specialist position was created in or about January 2005 and filled by Dave Hannam. Hannam's prior job was in the bargaining unit. The material and resource specialist is responsible for scheduling the transfer of material from inventory that is used in the Tedlar treating and finishing area. He matches the open orders for Tedlar with the appropriate material and machinery to most efficiently fill customer orders. He uses SAP to perform these duties. He communicates with the customer service representatives to determine if the orders have been cleared for credit. Customer service representatives are non-bargaining unit employees and are located off-site at various Employer locations throughout the world. Hannam was involved in training the customer service representatives on the SAP system.

The material and resource specialist also interacts with bargaining unit employees located on the plant floor. He works with these employees to coordinate the distribution of material in the most efficient manner to fill the orders. Steve Converse, Hannam's immediate supervisor, described the material and resource specialist's interaction with the bargaining unit employees as "feedback going back and forth" between them to determine the most efficient way to fill the orders based on the allotted material.

Prior to the creation of the material and resource specialist position, the duties of the position were performed by Paul Schriber, a bargaining unit charter in the Tedlar department. After the creation of the material and resource specialist position, Schriber retired and was not

replaced.<sup>19</sup> James Pawlicki, file inspector, a bargaining unit employee, trained Hannam for the material and resource specialist position.<sup>20</sup> He testified that during the past 14 years he filled in for long periods of time in the charter position, and during that time performed the charter duties currently performed by Hannam. Pawlicki testified that substantially all of the duties performed by the charter are currently performed by the material and resource specialist. Pawlicki spends approximately 30 percent of the time working with Hannam. This occurs when there is a problem with the rolls of material on the production floor.

Converse and Debbie Whalen, area superintendent for employee relations, testified that the majority of the duties of the material and resource specialist position previously were performed by the charter classification. They testified that the material and resource specialist performs some additional duties involving the SAP system that previously were not performed by the charter, which amount to 25 to 35 percent of Hannam's duties. The record does not identify the specific nature of these additional duties.

Hannam's immediate supervisor is Steve Converse, master scheduler for Tedlar and Teflon films. Converse supervises Scott Knight, supplier specialist and Sheila Serafin, scheduler. Knight is a bargaining unit employee, while Serafin is not. Knight has a cubicle in a trailer outside the production building. Serafin has her own office located in the Tedlar building across the hall from Converse. Knight fills in for Hannam in his absence.

Hannam is a salaried, but he also receives an hourly overtime rate, as the Employer did not classify the position as exempt under the Fair Labor Standards Act. Hannam's salary range

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<sup>19</sup> Other charter positions in the Tedlar department were not eliminated with the creation of the material and resource specialist position. In this regard, as noted above, the production assistant Tedlar works with charters in the Tedlar department.

<sup>20</sup> The file inspector works on the production floor inspecting shipments before the material enters and exits the facility. He measures the rolls of Tedlar to ensure that measurements are accurate with the shipping orders and order numbers. He also verifies that the shipment is packaged correctly.

is \$37,332 to \$52,560 per year based on the SR-10 salary level on the Employer's non-exempt salary schedule. He works in a cubicle located approximately 5 to 10 feet from the Tedlar production floor and near the first-line supervisors in the finishing area. His work hours are generally from 6:00 a.m. until 3:00 p.m., Monday through Friday. He works some weekends, but the record does not indicate how frequently this occurs. Hannam attends weekly scheduling meetings with bargaining unit and non-bargaining unit employees. He also attends weekly customer service meetings, which do not include bargaining unit employees.

### **Tedlar SAP Data-Supervisor**

Garfield Wright is the Tedlar SAP data-supervisor.<sup>21</sup> Wright's position was created to integrate the SAP system with other Employer data systems at the Yerkes plant. He maintains the flow of data into the system for the Tedlar product. He is also responsible for system improvements and upkeep, including establishing the product parameters in SAP for new materials and processes. This allows the product to be viewed in the system and for others to order, sell, transfer, and place material into inventory. Wright troubleshoots and analyzes problems with the flow of information from various departments including production, shipping and receiving. He has a higher level of SAP system access than do bargaining unit employees and he is authorized to modify the system. Wright is responsible for training Tedlar employees on SAP.

Wright's work hours are from 8:00 a.m. to 4:00 p.m., Monday through Friday. He is a salaried employee and is not eligible for overtime. He works in a cubicle in the Tedlar building away from the production floor.<sup>22</sup>

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<sup>21</sup> The parties stipulated that the Tedlar SAP data-supervisor is not a supervisor within the meaning of Section 2(11) of the Act.

<sup>22</sup> The record is silent as to the specific location of Wright's office.



Wright goes to the production floor approximately once a week to troubleshoot problems on the production floor with the bar coding system. He spends one percent of his time on the production floor with bargaining unit employees. Wright corresponds with bargaining unit employees when necessary to gather information needed to set up new material and processes in SAP.

Wright's immediate supervisor is Christopher Davis, SAP business process integrator. No bargaining unit employees report directly to Davis. In Wright's absence, Davis fills in for Wright as SAP data supervisor. Wright attends daily management meetings to report on the status of the SAP system and to provide reports on the system. Bargaining unit employees do not attend such meetings unless invited. Wright also attends other management meetings in Davis' stead when Davis is not at the plant.

**Analysis:**

It is well established that a unit clarification petition is appropriate for resolving ambiguities concerning the unit placement of employees who are within a newly created classification. See, e.g., E.I. DuPont de Nemours, Inc., 341 NLRB 607 (2004); Developmental Disabilities Institute, Inc., 334 NLRB 1166 (2001); Premcor, 333 NLRB 1365 (2001); Bethlehem Steel Corporation, 329 NLRB 245 (1999). Under Board law, new employee classifications may be accreted into the existing bargaining unit when the "employees have little or no separate identity and share an overwhelming community of interest with the preexisting bargaining unit to which they are accreted." E.I. DuPont de Nemours, Inc., 341 NLRB at 608, quoting Ready Mix USA, Inc., 340 NLRB 946 (2003). See also, Safeway Stores, 256 NLRB 918 (1981).

The Board considers the following factors to determine if an accretion is appropriate: interchange and contact among employees, degree of functional integration, geographic proximity, similarity of working conditions, similarity of employee skills and functions, supervision and collective-bargaining history. Archer Daniels Midland Co., 333 NLRB 673, 675 (2001). In assessing the community of interest factors, the Board attributes more weight to employee interchange and common day-to-day supervision. Id. at 675; Towne Ford Sales, 270 NLRB 311, 311-312 (1984).

However, the Board does not apply an accretion analysis when the same basic duties performed by the new job classifications were historically performed by bargaining unit employees. Rather, “[t]he new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion.” Developmental Disabilities Institute, Inc., 334 NLRB 1166, 1168 (2001); Premcor, *supra*; The Sun, 329 NLRB 854 (1999). Once it is established that the duties were historically performed by bargaining unit employees, the party seeking their exclusion from the unit has the burden of establishing that their duties are sufficiently dissimilar to warrant their removal from the unit. See e.g., Texaco Port Arthur, 315 NLRB 828 (1994).

The Employer argues that all of the positions at issue, with the exception of the material and resource specialist, are exempt under the Fair Labor Standards Act (FLSA) and should be excluded from the unit because the bargaining unit description specifically includes office clerical employees not exempt under the FLSA, thus, in effect, excluding exempt office clerical employees.<sup>23</sup>

The Board, however, has found it insufficient to exclude an employee classification from an existing bargaining unit on the basis that employees in such classification are exempt under

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<sup>23</sup> The bargaining unit description expressly includes non-exempt office clerical employees. It does not expressly exclude non-exempt office clerical employees.

the FLSA, particularly in such classifications where there are unit employees, as here, who can be classified as exempt. See Trailways, Inc., 271 NLRB 612 (1984). Specifically, in the instant matter, the record establishes that there are salaried employees in the bargaining unit who earn between \$37,332 and \$52,560 per year, and hourly bargaining unit employees who earn \$26 per hour, or \$54,080 per year based on a 40-hour work week. Thus, there are bargaining unit employees who can be classified as exempt under the FLSA. Moreover, while the material and resource specialist is salaried and earns between \$37,332 and \$52,560 per year, the Employer chose not to make the position exempt under the FLSA.

Furthermore, I do not find that any of the new classifications that I shall include in the unit to be office clerical in nature. Office clerical employees perform duties that include bookkeeping, filing, collecting personnel information from employees and other functions related to the general operation of the office. See, e.g., In re Palagonia Bakery Co., 339 NLRB 515 (2003); Mitchellace, Inc., 314 NLRB 536 (1994). Rather, as discussed below, I find that the new classifications to be included in the unit perform duties akin to those performed by plant clerical employees. Plant clericals are employees who “perform functions closely allied to the production process or to the daily operations of the production facilities.” Desert Palace, Inc. d/b/a Caesars Tahoe, 337 NLRB 1096, 1098, 1100 (2002). Plant clerical employees are expressly included in the bargaining unit description and their inclusion is not limited by their FLSA exemption status.

### **Production Assistant Corian Sheet**

I conclude that the production assistants Corian sheet share an overwhelming community of interest with the bargaining unit employees and should be included in the existing bargaining unit. The bargaining unit employees interchange with the production assistants and share

common day-to-day supervision. The parties stipulated that the relief production assistant, a bargaining unit employee, fills in for the production assistants when they are absent. The production assistants and the bargaining unit reclaim group employees are both supervised by the process supervisor. These two factors favor their inclusion into the bargaining unit. Archer Daniels Midland Co., 333 NLRB 673, 675 (2001).

In addition, the production assistants Corian sheet have a high degree of contact with unit employees, their duties are functionally integrated, and they use similar skills. Together with production floor operators and reclaim group employees, the production assistants conduct monthly inventories and investigate inventory discrepancies of material ordered and shipped to the production floor. The operators input inventory information which the production assistant Corian sheet use to investigate and resolve inventory discrepancies with the assistance of the operators. Bargaining unit charters provide the production assistants and operators inventory data such as work orders and account sheets which they use to perform their duties. Therefore, the duties performed by the production assistants are those of plant clerical employees who are “closely allied to” and functionally integrated with the Corian production employees and processes. Desert Palace, Inc. d/b/a Caesars Tahoe.

I note that the production assistants’ salaries are within the range of salaries of employees included in the bargaining unit. While, unlike the production employees, the production assistants do not earn overtime pay and are on call during off-work hours, these distinctions do not outweigh the more important factors of common supervision and interchange and the evidence of employee contact and functional integration.<sup>24</sup>

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<sup>24</sup> I also note that while the production assistants Corian Sheet work in cubicles located off the production floor, there are bargaining unit employees who also work off the production floor in the Corian administrative area and in cubicles near the production floor.

I conclude that the production assistant Corian sheet share an overwhelming community of interest with bargaining unit employees. Accordingly, the existing bargaining unit is hereby clarified to include the production assistant Corian sheet classification.

### **Production Assistant Tedlar**

I find that the production assistants Tedlar do not share a sufficient community of interest with bargaining unit employees to warrant their clarification into the unit. The Board, in E.I. DuPont de Nemours, Inc., 341 NLRB at 608, reiterated its restrictive policy in accreting employees into an existing bargaining unit, particularly, when the employees lack common day-to-day supervision and interchange with the bargaining unit employees.

In the instant case, the production assistants Tedlar do not share common day-to-day supervision and do not interchange with bargaining unit employees. The production assistants Tedlar substitute for each other and, in the event both are on leave, the SAP business process integrator or one of the first-line supervisors would fill in for them. The two production assistants' respective immediate supervisors are area superintendents who do not supervise bargaining unit employees. Bargaining unit employees in the Tedlar department report directly to first-line supervisors. Both production assistants Tedlar were previously in non-bargaining unit positions. They attend meetings with management without bargaining unit employees and work closely with the first-line supervisors. The production assistants work in cubicles near the first-line supervisors.

Although the production assistants Tedlar spend a considerable amount of their time on the production floor with bargaining unit employees and their duties are functionally integrated with those of the bargaining unit employees, these factors are outweighed by the lack of common

day-to-day supervision and employee interchange, and the production assistants Tedlar's close alignment with management. See, E.I. DuPont de Nemours, Inc., supra.

I conclude that the production assistants Tedlar do not share an overwhelming community of interest with bargaining unit employees. Accordingly, the existing bargaining unit is not clarified to include the production assistant Tedlar classification.

### **Freight Verification-Shipping Coordinator**

I conclude that the freight verification-shipping coordinator shares an overwhelming community of interest with bargaining unit employees and should be included in the existing bargaining unit. Factors favoring unit inclusion include common day-to-day supervision, and job duties that are similar to, or functionally integrated with, those of bargaining unit employees.

In Kalustyans, 332 NLRB 843 (2000), the Board included in a unit<sup>25</sup> certain disputed employees who performed duties that a shipping clerk would perform, rather than exclude them as office clerical employees. The disputed employees generated work orders, picked tickets, bills of lading, and freight bills, all of which were documents integral to shipping operations. In addition, they had almost exclusive responsibility for making arrangements with carriers for shipping merchandise, negotiating freight rates, and answering customer calls concerning the status of shipments. They also generated sales contracts and confirmations on their individual computers; and, where the sale involved a "draw" from a buyer's call contract, they were also responsible for updating the buyer's call contract to note the amount drawn. The Board found these duties consistent with those of shipping clerks. See also, Blue Circle Cement Co., 319 NLRB 661, 666 (1995) (shipping clerks, among other functions, make a record of the customers' orders, prepare bills of lading and forward the bills of lading to the shipping area or loading dock

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<sup>25</sup> The unit consisted of grinders, millers, forklift operators, shipping and receiving employees, machine shop employees, sanitation employees, quality assurance employees, shipping clerks, packaging lead person, miller lead person, and all other warehouse employees.

for loading the trucks); Doxsee Food Corp., 218 NLRB 934, 935–936 (1975) (shipping clerk handled bills of lading, did light bookkeeping, typing, took care of back haul reports, and kept track of all incoming and outgoing materials and supplies).

Here, the freight verification-shipping coordinator's immediate supervisor also supervises bargaining unit shipping and receiving employees. Similar to the employees at issue in the above-referenced cases who performed work akin to a plant clerical shipping clerk, the freight verification-shipping coordinator collects from the shipping and receiving employees bills of lading, inbound and outbound shipping documents, and reviews shipping paperwork to ensure the safe transportation of hazardous materials pursuant to DOT regulations. The shipping and receiving employees and freight verification coordinator work together to arrange the shipping of hazardous material. The freight verification-shipping coordinator uses his DOT certification and training to perform his job duties. There are bargaining unit employees with the same DOT certification and training as the freight verification-shipping coordinator.

The freight verification-shipping coordinator also has contact with production employees in the Corian and Tedlar production areas, where he spends approximately 10 to 15 percent of his time. He also works with bargaining unit employees in the purchasing department to clarify any discrepancies with the purchase orders and freight records. He also has contact with the Tedlar accountant/planner, a bargaining unit employee, when there are problems with a freight transaction in SAP.

The record reflects that the freight verification-shipping coordinator is salaried and does not earn overtime pay. He is also responsible for authorizing payments for incoming inventory and he consults with the Employer's Wilmington office concerning the payment authorization system. These facts, however, are insufficient to establish that the freight verification-shipping

coordinator is an office clerical employee, where the majority of the evidence establishes that he is a plant clerical employee , more clearly aligned with the production process. See Desert Palace, Inc. d/b/a Ceasars Tahoe, 337 NLRB at 1098, 1100. In this regard, as noted above, the freight verification-shipping coordinator is supervised by the same individual as the shipping and receiving unit employee. He has frequent contact and works with the shipping employees, and he has contact with bargaining unit production employees. I further note that the freight verification shipping coordinator's office is located in the Corian administrative office with bargaining unit plant clerical employees.

Based on the record evidence, I find that the freight verification-shipping coordinator shares an overwhelming community of interest with bargaining unit employees. Accordingly, the existing bargaining unit is hereby clarified to include the freight verification shipping coordinator classification.

### **Material and Resource Specialist**

I conclude that the material and resource specialist shares an overwhelming community of interest with bargaining unit employees and should be included in the existing bargaining unit.

The material and resource specialist and the supplier specialist, the latter being a bargaining unit position, are supervised by the master scheduler for Tedlar and Teflon. The record also establishes that there is temporary interchange, as the supplier specialist fills in for the material resource specialist in the latter's absence. The material and resource specialist works with bargaining unit employees on the plant floor to coordinate the distribution of material to fill orders. He works in a cubicle located approximately 5 to 10 feet from the Tedlar production floor and near the first-line supervisors in the finishing area. The material and resource specialist attends weekly scheduling meetings with bargaining unit and non-bargaining



unit employees. While the Employer has classified the material and resource specialist as exempt salaried, he receives an hourly overtime rate. The record also establishes that the position's salary level is classified as SR-10, pursuant to the Employer's non-exempt salary schedule.

I further find, based on the record evidence, that the material and resource specialist position belongs in the existing bargaining unit because this position performs the same basic functions as those historically performed within the unit. See Premcor, 333 NLRB 1365 (2001); Developmental Disabilities Institute, Inc., 334 NLRB 1166 (2001).

In Premcor, supra, the Board included a newly created position into the existing production and maintenance unit because the new position's duties were fundamentally the same as those of bargaining unit employees, the work functions included the same responsibilities of unit employees and the new classification was responsible for maintaining continuous communication with unit employees.

Here, the material and resource specialist's duties are fundamentally the same as those previously performed by one of the bargaining unit charters. The bargaining unit employee who trained the material and resource specialist testified that 100 percent of the charter's duties are currently performed by the material and resource specialist. While the Employer asserts that the material and resource specialist has additional duties not performed by the charter position, the record is silent as to the specific duties, other than that they involve the use of the SAP. Bargaining unit employees also use SAP. Thus, the use of SAP to perform unspecified duties is insufficient to warrant the position's continued exclusion from the unit. The Employer, thus, has failed to meet its burden, as the party seeking exclusion, to establish that the material and

resource specialist's duties are sufficiently dissimilar from the charter's duties to warrant the removal of the position from the unit. Texaco Port Arthur, 315 NLRB 828 (1994).

Accordingly, the existing collective-bargaining unit is hereby clarified to include the material and resource specialist classification.

### **Tedlar SAP Data-Supervisor**

I conclude that the Tedlar SAP data-supervisor does not share a sufficient community of interest with bargaining unit employees to warrant clarification of the position into the unit. The position does not have common day-to-day supervision, or interchange with, bargaining unit employees. The Tedlar SAP data-supervisor has infrequent contact with unit employees, and has duties that are specific to integrating the Employer's computer systems, rather than duties associated with the production process.

The Tedlar SAP data-supervisor's immediate supervisor is the SAP business process integrator. No bargaining unit employees report directly to the SAP business process integrator. When the Tedlar SAP data supervisor is absent, the SAP business process integrator, rather than bargaining unit employees, fills in for him.

The Tedlar SAP data-supervisor has little interaction with bargaining unit employees. He goes to the production floor approximately once a week, where he spends approximately one percent of his time with bargaining unit employees troubleshooting problems with the bar coding system. He works in a cubical in the Tedlar building away from the production floor.

The Tedlar SAP data-supervisor attends daily management meetings to report on the status of the SAP system and to provide reports on the system. Bargaining unit employees do not attend such meetings unless invited.

He also attends other management meetings on behalf of his immediate supervisor when his supervisor is absent from the facility.

The Tedlar SAP data supervisor position was created to integrate the SAP system with other data systems at the Yerkes plant. The Tedlar SAP data-supervisor maintains the flow of data into SAP for the Tedlar product and implements system improvements. He has a higher level of access to SAP than do bargaining unit employees, which allows him to modify the system. He is also responsible for training Tedlar users of SAP.

Thus, the record establishes that the Tedlar SAP data-supervisor's duties are not directly related to the production process and that he is more closely aligned with management than with the unit employees. I therefore conclude the Tedlar SAP Data-Supervisor lacks a sufficient community of interest with bargaining unit employees to warrant clarification into the unit. Accordingly, the existing bargaining unit is not clarified to include the Tedlar SAP data supervisor classification.

## **Conclusion**

Based on the foregoing and the entire record evidence, the existing bargaining unit is clarified to include the production assistant Corian sheet, the freight verification-shipping coordinator, and the material and resource specialist classifications; but not the production assistant Tedlar and the Tedlar SAP data-supervisor classification.

## **ORDER**

**IT IS HEREBY ORDERED** that the existing Unit, represented by the Petitioner, be, and hereby is, clarified in part to include the production assistant Corian sheet, the freight verification-shipping coordinator and the material and resource specialist job classifications.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **July 28, 2006**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file a request for review of this Decision electronically, please refer to the attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: [www.nlr.gov](http://www.nlr.gov).

**DATED** at Buffalo, New York this 14th day of July, 2006.

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